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4 UNITED STATES DISTRICT COURT

5 DISTRICT OF NEVADA

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7 NLRK, LLC,

Case No. 3:21-cv-00073-LRH-WGC

8 Plaintiff,

ORDER

9 v.

10 INDOOR AG-CON, LLC, et al.,

11 Defendants.

12
13 Before the Court is Plaintiff/Counter-Defendant NLRK LLC's ("NLRK") partial motion
14 to dismiss counterclaims (ECF No. 24). The Defendants/Counter-Plaintiffs Indoor Ag-Con, Nancy
15 Hallberg, Kris Sieradzki, and Brian Sullivan (collectively "Defendants")¹ filed a response (ECF
16 No. 31), to which NLRK replied (ECF No. 32). For the reasons articulated below, the Court grants
17 the motion in part and denies the motion in part.

18 **I. BACKGROUND**

19 Indoor Ag-Con is a Nevada limited liability company that "hosts events relating to indoor
20 agriculture; growing crops in greenhouses, warehouses, and containers using hydroponic,
21 aquaponic, and aeroponic technologies." ECF No. 1 at 1-2; ECF No. 18 at 2-3. In early December
22 2018, the sole member of Indoor Ag-Con, NLRK, entered into a Membership Interest Purchase
23 Agreement ("Purchase Agreement") with Individual Counterclaimants.² ECF No. 1 at 2; ECF No.
24 18 at 3. In the Purchase Agreement, NLRK agreed to sell "one hundred percent (100%) of the
25 membership interest of" Indoor Ag-Con to Individual Counterclaimants. ECF No. 1-2 at 2. In
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27 ¹ Nancy Hallberg, Kris Sieradzki, and Brian Sullivan assert counterclaims that Indoor Ag-con is not a party to. Thus,
28 Nancy Hallberg, Kris Sieradzki, and Brian Sullivan will be referred to as "Individual Counterclaimants" and Indoor
Ag-Con will be referred to as "Indoor Ag-Con" when appropriate.

² The parties agree that ECF No. 1-2 is an accurate copy of the agreement. ECF No. 1 at 2; ECF No. 18 at 3.

1 relation to the Purchase Agreement, Indoor Ag-Con signed a Secured Promissory Note
 2 (“Promissory Note”) in favor of NLRK and entered into a Security Agreement with NLRK. ECF
 3 No. 1 at 3; ECF No. 18 at 4.³ In addition, Indoor Ag-Con and NLRK entered into a Consulting
 4 Agreement that set the terms of NLRK’s consulting services for various events that Indoor Ag-
 5 Con hosts.⁴ ECF No. 1 at 4; ECF No. 18 at 6; ECF No. 1-5 at 2.

6 NLRK filed the initial complaint in this action, alleging that Individual Counterclaimants
 7 breached the Purchase Agreement; Indoor Ag-Con breached the Promissory Note and Security
 8 Agreement; NLRK has the right to obtain possession of the collateral for the Promissory Note; and
 9 Indoor Ag-Con breached the Consulting Agreement. ECF No. 1 at 5–8. In response, Defendants
 10 denied NLRK’s allegations, raised twelve affirmative defenses, and filed a counterclaim and third-
 11 party complaint containing eight claims against NLRK, Nicola Kerslake, and Contain, Inc.⁵ ECF
 12 No. 18. Defendants’ counterclaims include: (1) breach of the Purchase Agreement; (2) breach of
 13 the Consulting Agreement; (3) fraudulent misrepresentation or omission; (4) intentional
 14 interference with prospective economic advantage; (5) theft of trade secrets in violation of NRS §
 15 600A.010; (6) violation of the Computer Fraud and Abuse Act (“CFAA”); (7) violation of NRS §
 16 205.4765; and (8) trespass to chattels. ECF No. 18 at 20–21.

17 NLRK moved to dismiss six of the counterclaims under Federal Rule of Civil Procedure
 18 12(b)(6) (“Rule 12(b)(6)”) and challenged the Defendants’ standing to assert four of the
 19 counterclaims under Rule 12(b)(1). ECF No. 24.

20 **II. LEGAL STANDARD**

21 **A. Motion to Dismiss**

22 A party may seek the dismissal of a claim under Rule 12(b)(6) for “failure to state a claim
 23 upon which relief can be granted.” To survive a motion to dismiss, enough facts must be plead “to
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³ The parties agree that ECF No. 1-3 is an accurate copy of the Promissory Note and that ECF No. 1-4 is an accurate copy of the Security Agreement. ECF No. 1 at 3; ECF No. 18 at 4.

⁴ The parties agree that ECF No. 1-5 is an accurate copy of the Consulting Agreement. ECF No. 1 at 4; ECF No. 18 at 6.

⁵ In its motion to dismiss, NLRK stated “Procedurally, the third-party complaint is deficient because Counterclaimants/Third-Party Plaintiffs do not seek contribution, indemnity, or any other type of relief allowed under Rule 14 of the Federal Rules of Civil Procedure (‘Rule’).” ECF No. 24 at 2 n.2. However, the motion before the Court is brought by only NLRK. Accordingly, the Court will not address the counterclaims in relation to Nicola Kerslake or Contain, Inc.

1 state a claim to relief that [was] plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 2 570 (2007); *see also* Fed. R. Civ. P. 8(a)(2) (requiring “a short and plain statement of the claim
 3 showing that the pleader is entitled to relief”). The plausibility standard requires the claimant to
 4 plead “factual content that allows the court to draw the reasonable inference that the defendant is
 5 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility
 6 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that
 7 a defendant has acted unlawfully.” *Id.* at 678–79. Therefore, “[t]hreadbare recitals of the elements
 8 of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678. The
 9 court discounts these allegations because “they do nothing more than state a legal conclusion—
 10 even if that conclusion is cast in the form of a factual allegation.” *Moss v. U.S. Secret Serv.*, 572
 11 F.3d 962, 969 (9th Cir. 2009). “In sum, for a [claim] to survive a motion to dismiss, the non-
 12 conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly
 13 suggestive of a claim entitling the plaintiff to relief.” *Id.*

14 “Although generally the scope of review on a motion to dismiss for failure to state a claim
 15 is limited to the Complaint, a court may consider evidence on which the complaint necessarily
 16 relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiffs’
 17 claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6)
 18 motion.” *Daniels—Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (internal quotations
 19 and citations omitted). The court may “treat such a document as “part of the complaint, and thus
 20 may assume that its contents are true for purposes of a motion to dismiss under Rule
 21 12(b)(6).” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (quoting *United States v. Ritchie*,
 22 342 F.3d 903, 908 (9th Cir. 2003)).

23 **B. Leave to Amend**

24 Federal Rule of Civil Procedure 15(a)(2) allows a court to “freely give leave [to amend]
 25 when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit emphasizes that a court
 26 should grant leave to amend “unless it determines that the pleading could not possibly be cured by
 27 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quotation
 28 omitted). This is consistent with the underlying purpose of Rule 15: “to facilitate decisions on the

merits, rather than on the pleadings or technicalities.” *Id.* at 1127 (quotation omitted). Therefore, leave to amend should be denied only if allowing the amendment would unduly prejudice the opposing party, cause undue delay, be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). In the District of Nevada, Local Rule 15-1(a) requires the party seeking leave to amend to “attach the proposed amended pleading to a motion seeking leave of the court to file an amended pleading.”

III. DISCUSSION

A. NLRK’s motion to dismiss Indoor Ag-Con’s Counterclaims 1 and 3 and Individual Counterclaimants’ Counterclaims 2 and 5 for lack of standing is granted and leave to amend is denied.

NLRK argues and Defendants concede that Indoor Ag-Con lacks standing to assert Counterclaims 1 and 3 and that Individual Counterclaimants lack standing to assert Counterclaims 2 and 5. ECF No. 24 at 5; ECF No. 31 at 7.

To have standing to assert a breach of contract claim, a party must be the recipient of the promise or its intended third-party beneficiary. *Meritage Homes of Nev., Inc. v. FNBN-Rescon I, LLC*, 86 F. Supp. 3d 1130, 1139, 1143 (D. Nev. 2015).

Counterclaims 1 and 3 address an alleged breach of the Purchase Agreement and alleged fraudulent misrepresentation or omission in relation to that agreement. ECF No. 18 at 20, 23. The Purchase Agreement was entered into by Individual Counterclaimants and NLRK. Indoor Ag-Con was not a party to and does not claim to be an intended third-party beneficiary of the purchase agreement. Further, the fraudulent misrepresentation or omission claim is addressing communications directed at Individual Counterclaimants in relation to the Purchase Agreement. It is not addressing any communication with Indoor Ag-Con. Thus, Indoor Ag-Con does not have standing to assert a breach of contract claim or fraudulent misrepresentation or omission claim in relation to the Purchase Agreement.

Counterclaims 2 and 5 address an alleged breach of the Consulting Agreement and the alleged misappropriation of Indoor Ag-Con’s trade secrets in violation of the Nevada Trade Secrets

1 Act. The Consulting Agreement was entered into by NLRK and Indoor Ag-Con. Individual
 2 Counterclaimants were not parties to and do not claim to be intended third-party beneficiaries of
 3 the agreement. Thus, Individual Counterclaimants do not have standing to assert a breach of
 4 contract claim in relation to the Consulting Agreement. Further, Individual Counterclaimants
 5 allege that NLRK misappropriated trade secrets belonging to Indoor Ag-Con. Because the trade
 6 secrets belong to Indoor Ag-Con, not Individual Counterclaimants, they do not have standing to
 7 assert the misappropriation of trade secrets claim.

8 Therefore, the Court holds that Indoor Ag-Con lacks standing to assert Counterclaims 1
 9 and 3 and that Individual Counterclaimants lack standing to assert Counterclaims 2 and 5. Standing
 10 deficiencies cannot be cured, making leave to amend futile. Accordingly, the Court denies the
 11 request for leave to amend. Indoor Ag-Con may assert Counterclaims 2 and 5 and Individual
 12 Counterclaimants may assert Counterclaims 1 and 3. Whether Counterclaims 1 and 3 should be
 13 dismissed on other grounds is addressed below.

14 **B. NLRK's motion to dismiss Individual Counterclaimants' Counterclaim 1 is denied.**

15 Under Counterclaim 1, Individual Counterclaimants allege that Plaintiff breached the
 16 Purchase Agreement by improperly and illegally accessing a confidential client list. ECF No. 18
 17 at 20–21. Plaintiff moves to dismiss the counterclaim under Rule 12(b)(6) alleging that the
 18 Purchase Agreement addresses only the purchase of NLRK's membership interest and does not
 19 involve the transfer of an alleged confidential client list. ECF No. 24 at 8–9.

20 To sustain a breach of contract claim under Nevada law, a plaintiff must show "(1) the
 21 existence of a valid contract, (2) a material breach by the defendant, and (3) damages as a result of
 22 the breach." *Tarr v. Narconon Fresh Start*, 72 F. Supp. 3d 1138, 1141 (D. Nev. 2014).

23 The Court finds that Individual Counterclaimants plausibly pled the elements of a breach
 24 of contract claim. They pled that (1) Individual Counterclaimants and NLRK entered into the
 25 Purchase Agreement; (2) NLRK violated the agreement "by improperly and illegally accessing
 26 Indoor Ag-Con's confidential client list" which was "an asset of Indoor Ag-Con's that transferred
 27 with the execution and closing of the" agreement because Indoor Ag-Con's "confidential business
 28 information" was the primary asset of the membership interest; and (3) Individual

Counterclaimants suffered damages because “the confidentiality and value of the client list has been compromised and diminished.” ECF No. 18 at 15, 20–21. The Court finds this pleading sufficient to state a claim upon which relief may be granted.

Thus, NLRK’s motion to dismiss Individual Counterclaimants’ Counterclaim 1 is denied.

C. Counterclaim 3 is dismissed and leave to amend is granted.

NLRK seeks the dismissal of Counterclaim 3 on three grounds: (1) Nevada’s UTSA preempts the claim; (2) Defendants’ claim is “a dressed up breach-of-contract claim”; and (3) Defendants did not meet the requisite pleading standard for fraud claims. ECF No. 24 at 7–8, 9–11, 11 n.4. The Court agrees that Defendants did not meet Rule 9(b)’s heightened pleading standard for fraud claims and therefore does not reach the questions of whether Nevada’s UTSA preempts the claim and whether the claim is properly dismissed as a “dressed up breach-of-contract claim.”

To state a claim for fraud, a plaintiff must allege three elements: (1) a false representation that is made with either knowledge or belief that it is false or without sufficient foundation; (2) an intent to induce another’s reliance on such false representation; (3) justifiable reliance; and (3) damages. *See Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420, 426 (Nev. 2007). In addition, the Federal Rules of Civil Procedure require that a claim of “fraud or mistake” be alleged “with particularity” as to the “circumstances constituting [that] fraud or mistake.” Fed. R. Civ. P. 9(b). “In other words, the pleading ‘must “identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false.”’” *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 668 (9th Cir. 2019) (quoting *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013)).

After reviewing Defendants’ pleadings, the Court finds that they do not satisfy Rule 9(b)’s heightened pleading standard. Several of Defendants’ allegations are conclusory in nature and fail to indicate how NLRK’s actions were misleading or false, or how they induced reliance and what reliance they induced. Such allegations do not meet the Rule 9(b) pleading standard. Additionally, allegations of fraud based on information and belief will not usually satisfy Rule 9(b). *Zatkin v. Primuth*, 551 F. Supp. 39, 42 (S.D. Cal. 1982). The Court recognizes that the Rule 9(b) pleading requirement may be relaxed as to “matters peculiarly within the opposing party’s knowledge” in

1 situations where plaintiffs cannot be expected to have personal knowledge of the facts prior to
2 discovery. *See, e.g., Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th
3 Cir.1987) (overruled on other grounds). In such cases, a complaint based on information and belief
4 is sufficient if it includes a statement of the facts upon which the belief is based. *Zatkin*, 551 F.
5 Supp. at 42. Here, however, Defendants provide no basis for their beliefs regarding NLRK's intent.
6 As such, these allegations are insufficient to meet the relaxed Rule 9(b) standard.

7 Therefore, the Court finds that Defendants have failed to sufficiently allege their fraud
8 claim and dismisses Counterclaim 3. Defendants have requested leave to amend their
9 counterclaim, but they have not satisfied Local Rule 15-1 by submitting an amended complaint for
10 the Court's review. The Ninth Circuit, however, directs the court to grant leave to amend unless
11 allowing the amendment would unduly prejudice the opposing party, cause undue delay, be futile,
12 or if the moving party has acted in bad faith. The Court will grant Defendants leave to amend the
13 counterclaim.

14 **D. Defendants' Counterclaim 4 is dismissed and leave to amend is granted.**

15 NLRK argues that Counterclaim 4 should be dismissed for three reasons: (1) Nevada's
16 UTSA preempts the claim; (2) Defendants failed to plausibly state a claim for intentional
17 interference with prospective economic advantage; and (3) Defendants consented to the dismissal
18 of Counterclaim 4 under Local Rule 7-2(d). The Court agrees that Defendants failed to plausibly
19 state a claim and therefore does not reach the questions of whether Nevada's UTSA preempts the
20 claim and whether Defendants consented to the dismissal of Counterclaim 4.

21 In Nevada, a party must plead five factors for an intentional interference with prospective
22 advantage claim:

- 23 (1) a prospective contractual relationship between the plaintiff and a third party; (2)
24 knowledge by the defendant of the prospective relationship; (3) intent to harm the
25 plaintiff by preventing the relationship; (4) the absence of privilege or justification
26 by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's
27 conduct.
28

1 *Kahn v. Dodds*, 127 Nev. 196, 226 (2011) (quotation omitted). To establish the requisite intent to
 2 harm, a plaintiff “must show that the means used to divert the prospective advantage was unlawful,
 3 improper, or was not fair and reasonable.” *Custom Teleconnect, Inc. v. Int’l Tele-Servs., Inc.*, 254
 4 F. Supp. 2d 1173, 1181 (D. Nev. 2003) (citations omitted). Further, to allege actual harm, a
 5 plaintiff must allege that he “would have been awarded the contract but for the defendant’s
 6 interference.” *Bally Techs., Inc. v. Bus. Intel. Sols.*, No. 2:10-CV-004400-PMP-GWF, 2012 WL
 7 3656498, at * 4 (D. Nev. Aug. 23, 2012). Finally, to sufficiently allege a claim for intentional
 8 interference with prospective business advantage, it is essential that the plaintiff plead facts
 9 showing that defendant interfered with plaintiff’s relationship with a particular
 10 individual. *Damabeh v. 7-Eleven, Inc.*, No. 5:12-CV-1739-LHK, 2013 WL 1915867, at *10 (N.D.
 11 Cal. May 8, 2013). Allegations that a defendant interfered with the plaintiff’s relationship with an
 12 unidentified customer are not sufficient, nor are general allegations that the plaintiff had ongoing
 13 expectations in continuing economic relationships with current or prospective customers. *Id.*

14 In its motion to dismiss, NLRK argues that Defendants have made conclusory statements
 15 in attempt to satisfy the factors. The Court agrees. Defendants used conclusory statements to allege
 16 the five factors of an intentional interference with prospective economic advantage claim but failed
 17 to include any factual elaboration to show how the factors are satisfied. For example, Defendants
 18 broadly allege that current and prospective contractual relationships exist and that NLRK
 19 interfered with them. However, Defendants failed to allege a specific relationship or a specific
 20 prospective customer relationship that NLRK allegedly interfered with. Such conclusory
 21 statements are not sufficient to state a claim upon which relief may be granted.

22 Therefore, the Court grants NLRK’s motion to dismiss Counterclaim 4 and grants
 23 Defendants’ request for leave to amend.

24 **E. Counterclaim 6 is dismissed and leave to amend is granted.**

25 NLRK argues that Defendants’ counterclaim under the Computer Fraud and Abuse Act
 26 (“CFAA”) should be dismissed for two reasons: (1) no private right of action exists for the CFAA
 27 claim because Defendants failed to plausibly allege any damage or loss, let alone \$5,000 worth as
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1 required by the statute and (2) even if they did adequately allege concrete damage or loss, they did
2 not plead sufficient facts to state claims under the CFAA.

3 Though primarily a criminal statute, the CFAA provides a civil cause of action for a party
4 “who suffers damage or loss by reason of a violation” of the CFAA. 18 U.S.C. § 1030(g). A civil
5 action may be entertained only if certain enumerated conduct is involved. *Id.* Here, the only
6 relevant enumerated type of conduct is that the conduct must have caused loss totaling at least
7 \$5,000 in value during any one-year period. *Id.* at § 1030(c)(4)(A)(i)(I). Accordingly, to prove a
8 violation under the CFAA, Defendants must prove at least \$5,000 in loss as well as the elements
9 of the particular subsection of the CFAA under which Defendants bring their claim.

10 NLRK first argued that a private right of action does not exist for Defendants’ claim
11 because they did “not plausibly allege *any* ‘damage or loss,’ let alone \$5,000 worth.” ECF No. 24
12 at 11. In response, Defendants claimed they “cannot quantify an amount for damages, such as
13 consequential damages at this pleading stage” and that they “aver[] losses as irreparable losses and
14 no money can restore the losses due to the breach.” ECF No. 31 at 10–11. Regardless, Defendants
15 asked for leave to amend to allege monetary losses exceeding \$5,000. ECF No. 31 at 11.

16 The CFAA defines “loss” as “any reasonable cost to any victim, including the cost of
17 responding to an offense, conducting a damage assessment, and restoring the data, program,
18 system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or
19 other consequential damages incurred because of interruption of service.” 18 U.S.C. § 1030(e)(11).
20 The CFAA defines “Damage,” on the other hand, as “any impairment to the integrity or availability
21 of data, a program, a system, or information.” *Id.* at § 1030(e)(8).

22 Upon review of Defendants’ counterclaim, the Court finds that they have not plausibly
23 alleged a loss of at least \$5,000 to give rise to a civil action under the CFAA. Defendants allege
24 that they “suffered damage and loss, including without limitation, (i) impairment to the integrity
25 and availability of Indoor Ag-Con’s confidential client list; (ii) expenses involved in investigation
26 of Counterclaim/Third-party Defendants’ improper and unauthorized access; and (iii) lost business
27 opportunities, profits and other damages in amounts to be determined at trial,” and that the
28 “unlawful access to and theft” has caused “irreparable injury in that the confidentiality of the client

1 list has been compromised, and no amount of money can restore the breached confidentiality of
2 the client list.” ECF No. 18 at 28–29. However, they have neither alleged that they suffered damage
3 or loss of at least \$5,000 nor plead facts that would support such a conclusion. Defendants’
4 allegations are little more than conclusory statements without factual support. Thus, Defendants
5 have plainly failed to state a claim for relief under the CFAA.

6 NLRK also challenged Defendants’ CFAA claim on the basis that Defendants failed to
7 plausibly plead the elements of a CFAA claim by “mechanically recit[ing] the basic sections of
8 CFAA” without providing factual enhancement about how NLRK violated the provisions. The
9 Court reviews each of the alleged violations below.

10 First, Defendants claim that NLRK violated Section (a)(2)(C), which makes it unlawful to
11 “intentionally access a computer without authorization or exceed authorized access, and thereby
12 obtain . . . information from any protected computer.” Through incorporation by reference in ¶87,
13 Defendants pled that NLRK “accessed Indoor Ag-Con’s client list on GetResponse at least nine
14 times” and obtained the list of clients, including clients added after the December 2018 sale;
15 provided relevant dates of the access; and pled that NLRK did not have permission through either
16 the Purchase Agreement or the Consulting Agreement for such access. ECF No. 18 at 18–20, 28–
17 29. The Court finds that this pleading is sufficient to state a violation of Section (a)(2)(C).

18 Next, Defendants argue that NLRK violated Section 1030(a)(4), which makes it unlawful
19 to “knowingly and with intent to defraud, access[] a protected computer without authorization, or
20 exceed[] authorized access, and by means of such conduct further[] the intended fraud and obtain[]
21 anything of value.” In its motion to dismiss, NLRK argued that the heightened pleading standard
22 of Rule 9(b) applies to this CFAA claim because it is “ground in fraud.” ECF No. 24 at 13.
23 Specifically, NLRK argues that Defendants did not “allege intent to defraud” with particularity.
24 ECF No. 24 at 13.

25 The majority of district courts in the Ninth Circuit that have addressed the issue require
26 claims under 18 U.S.C. § 1030(a)(4) to be pled with particularity under Rule 9(b) “when fraudulent
27 conduct is specifically alleged as the basis for the wrongdoing.” *See, e.g., NetApp, Inc. v. Nimble*
28 *Storage*, 41 F. Supp. 3d 816, 834 (N.D. Cal. 2014); *see also Prop. Rts. Law Grp., P.C. v. Lynch*,

1 No. 13-00273 SOM/RLP, 2013 WL 479185, at *4 (D. Haw. Sept. 6, 2013) (acknowledging that
2 Rule 9(b) requires the “furthers the intended fraud” element of Section 1030(a)(4) to be pled with
3 particularity); *Banc of Cal., NA v. McDonnell*, No. 18-01194 AG (ADSx), 2018 WL 8693922, at
4 *4 (C.D. Cal. 2018 Nov. 8, 2018) (requiring CFAA claims to be pled with particularity when they
5 “are based on a unified course of fraudulent conduct” because such claims are “grounded in
6 fraud”). However, under Rule 9(b) and Ninth Circuit precedent, the state of mind requirement,
7 “intent to defraud,” may be pled generally rather than with particularity. *See* Fed. R. Civ. P. 9(b);
8 *Odom v. Microsoft Corp.*, 486 F.3d 541, 554 (9th Cir. 2007).

9 After reviewing Defendants’ counterclaims and relevant case law, it appears to the Court
10 that a heightened pleading standard would not be appropriate in this case. Cases that have applied
11 the Rule 9(b) standard involved broad fraudulent schemes. For example, in *EWiz Express Corp. v.*
12 *Ma Laboratories, Inc.*, a case that NLRK cited in support of the heightened pleading standard, the
13 court found it appropriate to apply Rule 9(b) when “Defendants undertook a scheme to steal
14 Plaintiff’s customers and business by forming competing companies having misleadingly similar
15 business names and internet domains” and intended to delete Plaintiff’s website so they could not
16 sell products. No. 15-CV-01213, 2015 U.S. Dist. LEXIS 131848 (N.D. Cal. Sept. 28, 2015)
17 (quotation omitted). And in *Oracle America, Inc. v. Service Key, LLC*, it was alleged that a party
18 “fraudulently induced customers of Oracle to cancel their support agreements with Oracle” and
19 “falsely represented to its customers and potential customers that they could still obtain—from
20 [DLT]—software patches and updates for their Oracle computer products[.]” No. C 12-00790
21 SBA, 2012 U.S. Dist. LEXIS 171406 (N.D. Cal. Dec. 3, 2012) (quotation omitted). In both cases,
22 the claimant was alleging a unified course of fraudulent conduct that gave rise to the claim.

23 However, that does not appear to be the case here. Defendants merely pled that NLRK
24 accessed the client list without permission and that NLRK gained access to the client list containing
25 Indoor Ag-Con’s contacts. They have not provided any factual context for their allegation that
26 NLRK accessed it “knowingly and with intent to defraud” or that they furthered the intended fraud.
27 Though Defendants did initially plead a fraudulent misrepresentation claim, it does not appear that
28 they are alleging a connection between the fraudulent misrepresentation claim and the CFAA

1 claim. Without any factual elaboration, the Court cannot determine if Defendants are alleging a
2 unified course of fraudulent conduct. However, the Court recognizes that Defendants' current
3 pleading failed to sufficiently plead a violation regardless of what standard applies to the Section
4 1030(a)(4) claim because Defendants have failed to meet even the Rule 8 pleading standard.

5 Lastly, Defendants claim that NLRK violated both Sections 1030(a)(5)(B) and
6 1030(a)(5)(C), which make it unlawful to "intentionally access a protected computer without
7 authorization, and as a result of such conduct," either (1) recklessly cause damage or (2) cause
8 damage and loss.⁶ Section 1030(a)(5) is disjunctive by nature, therefore, Defendants must plead
9 sufficient facts to support that NLRK both "recklessly cause[d] damage" and "cause[d] damage
10 and loss" if they desire to plead violations of both Subsection (B) and (C). As found above,
11 Defendants have pled sufficient facts to support that NLRK "intentionally access[ed] a protect
12 computer without authorization." However, they have failed to plead sufficient facts to support
13 either that NLRK "recklessly cause[d] damage" or "cause[d] damage and loss." Defendants
14 provided conclusory allegations without any factual support to show damage or loss. Because
15 pleading that NLRK either "recklessly cause[d] damage" or "caused damage and loss" is essential
16 to a CFAA claim under Sections 1030(a)(5)(B) and 1030(a)(5)(C), the Court finds that Defendants
17 have failed to sufficiently plead a violation under either subsection.

18 For the reasons articulated above, the Court grants NLRK's motion to dismiss
19 Counterclaim 6 and grants leave to amend.

20 **F. NLRK's motion to dismiss Counterclaim 7 is denied.**

21 NLRK contends that Defendants' counterclaim under NRS § 205.4765 should be dismissed
22 because Defendants failed to plead facts sufficient to state a claim under the statute. ECF No. 24
23 at 14; ECF No. 32 at 6. In response, Defendants argue that their NRS § 205.4765 claim is similar
24 to their CFAA claim and that they overemphasized that NLRK took and accessed the client list
25 without authorization. ECF No. 31 at 11.

26
27 ⁶ The Court recognizes that Defendants pled their claims under 18 U.S.C. § 1030(a)(5)(A)(ii) and (iii). ECF No. 18 at
28 28. As NLRK points out, the numbers of the provisions pled were amended in 2008. ECF No. 24 at 11. However, the
substantive portions of the relevant provisions remained the same. Therefore, the Court addresses the claim under the
modern provision numbers, 18 U.S.C. § 1030(a)(5)(B) and 1030(a)(5)(C).

1 NRS § 205.4765(1) provides that it is unlawful for a person to knowingly, willfully and
 2 without authorization (a) modify; (b) damage; (c) destroy; (d) disclose; (e) use; (f) transfer; (g)
 3 conceal; (h) take; (i) retain possession of; (j) copy; (k) obtain or attempt to obtain access to, permit
 4 access to or cause access to; (l) or enter, data, a program or any supporting documents which exist
 5 inside or outside a computer, system or network. A victim of a crime under NRS § 205.4765 may
 6 bring a civil action to recover damages and costs and reasonable attorney's fees incurred in
 7 bringing the civil action. NRS § 205.511(1). Unlike the CFAA, NRS § 205.4765 does not require
 8 a minimum monetary amount of loss to bring a civil action.

9 The Court finds that Defendants have plausibly stated a claim upon which relief may be
 10 granted under NRS § 205.4765. Defendants pled that (1) NLRK "accessed Indoor Ag-Con's client
 11 list on GetResponse at least nine times" and provided relevant dates; (2) NLRK did not have
 12 permission through either the Purchase Agreement or the Consulting Agreement for such access;
 13 and (3) NLRK used the information "to solicit new business and/or to otherwise wrongfully
 14 advance their own interests," including by sending emails to Indoor Ag-Con's contacts acquired
 15 after the December 2018 sale. ECF No. 18 at 18–20, 29–30. The Court finds this pleading sufficient
 16 to state a claim upon which relief may be granted under NRS § 205.4765 and NRS § 205.511.

17 Accordingly, the Court denies NLRK's motion to dismiss Counterclaim 7.

18 **G. NLRK's motion to dismiss Counterclaim 8 is denied.**

19 NLRK argues that Defendants' trespass to chattels claim should be dismissed for three
 20 reasons: (1) Nevada's UTSA preempts the claim; (2) Defendants failed to state a claim for trespass
 21 to chattels; and (3) Defendants consented to the granting of NLRK's motion to dismiss the trespass
 22 to chattels claim by failing to respond to the argument in their response brief. The Court finds that
 23 Defendants have sufficiently stated a claim upon which relief may be granted.⁷

24 Trespass to chattels occurs when a person intentionally uses or intermeddles with a chattel
 25 in possession of another. Restatement (Second) of Torts § 217 (1965). A person will be liable to
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27 ⁷ The Court does not reach NLRK's preemption argument because dismissal is premature at the pleading stage in the
 28 context of preemption and the scope of Nevada's UTSA. *ImageKeeper LLC v. Wright Nat'l Flood Ins. Servs. LLC*,
 No. 2:20-cv-01470-GMN-VCF, 2021 WL 446631, at *5 (D. Nev. Sept. 29, 2021). In addition, the Court declines to
 dismiss the claim under Local Rule 7-2(d) at this stage of the proceedings.

1 the possessor of the chattel only if: “(a) he dispossesses the other of the chattel, or (b) the chattel
2 is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the
3 chattel for a substantial time, or (d) bodily harm is caused to the possessor, or harm is caused to
4 some person or thing in which the possessor has a legally protected interest.” *Id.* at § 218.

5 Defendants alleged that NLRK intentionally interfered with Indoor Ag-Con’s support
6 websites and internal databases and systems (such as GetResponse) and “caused damage to Indoor
7 Ag-Con’s rights to dominion and control over its property and . . . to the confidential and
8 proprietary nature of the information.” ECF No. 18 at 18–20, 30. Further, Defendants alleged that
9 it caused the property “to diminish in value and deprived Indoor Ag-Con of the intended uses of
10 its computer systems.” ECF No. 18 at 30. The Court finds this pleading sufficient to state a claim
11 upon which relief may be granted because Defendants alleged facts regarding NLRK’s conduct
12 and how it impaired the value and confidentiality of Defendants’ information and support websites.

13 Accordingly, the Court denies NLRK’s motion to dismiss Counterclaim 8.

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1 **IV. CONCLUSION**

2 IT IS THEREFORE ORDERED that NLRK's motion to dismiss (ECF No. 24) is granted
3 in part as follows:

- 4 a. Motion to dismiss Indoor Ag-Con's Counterclaims 1 and 3 and Individual
5 Counterclaimants' Counterclaims 2 and 5 for lack of standing is GRANTED;
6 b. Motion to dismiss Individual Counterclaimants' Counterclaim 1 under Rule 12(b)(6) is
7 DENIED;
8 c. Motion to dismiss Defendants' Counterclaims 3, 4, and 6 under Rule 12(b)(6) is
9 GRANTED;
10 d. Motion to dismiss Defendants' Counterclaims 7 and 8 under Rule 12(b)(6) is DENIED.

11 IT IS FURTHER ORDERED that Defendants' request for leave to amend Counterclaims
12 3, 4, and 6 is GRANTED. Defendants shall have 30 days from the entry of this Order to file an
13 amended pleading.

14 IT IS SO ORDERED.

15 DATED this 31st day of January, 2022.



16 LARRY R. HICKS
17 UNITED STATES DISTRICT JUDGE
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